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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 243.

THOMAS H. HULBERT,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error.

Error to Supreme Court of Illinois.

Reply Brief on Behalf of Plaintiff in Error.

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HOWARD & HELLER PRINT., CHICAGO.

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vs.
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Defendant in Error.
} Error to Supreme Court of Illinois.

Reply Brief on Behalf of Plaintiff in Error.

MAY IT PLEASE THE COURT:

The main points insisted upon by counsel for defendant in error are:

1. That the constitutionality of the Local Improvement Act of June 14, 1897, was not passed upon in the opinion of the Supreme Court of Illinois, and that the record does not show it was called to the attention of that court.

2. That no federal question is involved in the record.

3. That the constitutionality of the Act of 1897 has been sustained by the Supreme Court of Illinois.

4. That Sections 42 and 86 of said act, fixing the rate of interest, involves a local and not a federal

question, and that the Supreme Court of Illinois has held such sections constitutional and valid.

I.

AS TO THE QUESTION OF JURISDICTION.

Counsel for defendant in error claim that no federal question appears in the record herein other than in the objections filed in the trial court, and that the assignments of error are insufficient.

The objections filed in the trial court appear on pages 18 to 21 of printed record, and those involving a federal question are set out on pages 4 and 5 of brief of plaintiff in error. These objections clearly show that a federal question was before the trial and Supreme courts. The assignment of errors in the Supreme Court include all matters set forth in the objections, while the assignment of errors in this court show that a federal question was raised in the Supreme Court of Illinois. Further than this, the writ of error, appearing on page 1 of printed record, states that a question involving a clause of the Constitution of the United States was before the Supreme Court of Illinois, and that such question was decided against the plaintiff in error. The writ bears the endorsement of James B. Ricks, Chief Justice of the Supreme Court of Illinois. The petition for citation, appearing on pages 35 and 36 of printed record also states that "certain rights and privileges were claimed under the Constitution of the United States by said Thomas H. Hulbert, appellant, and that said Supreme Court of the State

of Illinois erroneously decided against said rights and privileges of said Thomas H. Hulbert, appellant, which were specially set up and claimed under said Constitution; and, further, that the validity of the authority exercised by said State of Illinois was drawn in question in said suit by said Thomas H. Hulbert, appellant, on the ground that said authority was repugnant to the Constitution of the United States, and the decision of said Supreme Court of Illinois was in favor of the validity of said authority so exercised; from all of which said Thomas H. Hulbert, appellant, alleges that it appears in the said record and proceedings in said suit manifest error has occurred, to the great damage of said Thomas H. Hulbert, appellant."

The bond herein, which was approved by the Chief Justice of the Supreme Court of Illinois, sets forth claims similar to those appearing in the writ and in the petition. From this record it seems that no doubt should exist as to whether or not a federal question was before the Supreme Court of Illinois, which question was determined against the contention of the plaintiff in error.

While the opinion of the Supreme Court of Illinois makes reference only to Sections 42 and 86 of the Local Improvement Act, and holds that said sections are not unconstitutional, and that they do not "deprive the property owner of his property without due process of law," yet, such finding is not conclusive that no other federal question was before such court for consideraiton. The fact that no reference is made in the opinion to other federal questions seems, from authorities following, to be wholly immaterial.

The certification by the Chief Justice of the Supreme Court of Illinois ought to be conclusive as to all matters which were in fact before such court for determination. From this record, therefore, plaintiff in error insists that certain federal questions were before the Supreme Court of Illinois for determination; that such court found against the claims of plaintiff in error, and that this court has jurisdiction to determine, upon the merits, the validity of the finding of such Supreme Court.

Counsel for defendant in error have cited several authorities which they claim hold that this court, under the record herein, is without jurisdiction. Plaintiff in error, however, feels justified in insisting that, under numerous decisions, this court has full and complete jurisdiction to determine the questions involved herein upon the merits.

The authorities cited below seem to hold that the question of jurisdiction is to be found by an inspection of the record, and if such inspection shows that a federal question must, of necessity, have been before the Appellate Court for determination, although no reference is made to such question in the finding of the Appellate Court, then a federal question is involved, and this court has jurisdiction.

To sustain this proposition the attention of the court is called to *Murray* v. *City Council of Charleston*, 96 U. S., 432 (440):

"* * * The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when this case was tried; and no judgment could have been given for the defendant without determining that the ordinances were laws

of the State, not impairing the obligation of the contracts made by the city with the plaintiff. And when the case was removed into the Supreme Court of the State, that court understood a federal question to be before it. One of the grounds of the notice of the appeal was, 'That such a tax is a violation of good faith in the contract of loans, impairs the obligation of said contract and is, therefore, unconstitutional and void.' It is plain, therefore, that both in the Common Pleas and in the Supreme Court of the State, a federal question was presented by the pleadings, and was decided—decided in favor of the state legislation, and against the right the plaintiff claimed he has under the Constitution of the United States. The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the State legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded, under the shield of State legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The Act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of the State, in suits 'where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarily involved, without

any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly.

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided and decided adversely to the federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the federal question was formally raised. In *Crowell* v. *Randall* (10 Pet., 368), it was laid down, after a review of almost all of our previous decisions, 'that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment. This case was followed by *Armstrong et al.* v. *The Treasurer of Athens Co.* (16 *id.*, 281), where it was held sufficient to give this court jurisdiction if it appear from the record of the State court that the federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it.

(443) "* * * Of course, the question is directly presented whether the ordinances are a justification; whether they can and do relieve the debtor from full compliance with the promise; in other words, whether the ordinances are valid and may lawfully be applied to the contracts. The court gave

judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction, therefore, is manifest."

In *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, it is stated (578):

"* * * At the final hearing, it moved the court, upon written grounds, for a final decree in its behalf; one of which was that the statutes of the State under which these proceedings were had, were in violation of the Constitution of the United States, in that they impaired the obligation of the contract between the State and the company, as well as of the contracts between the company and its policyholders and creditors.

"This motion was denied, and a final judgment rendered perpetually enjoining the company from further prosecution of its business. From that judgment a writ of error was prosecuted to the Supreme Court of the State, where, among other things, was assigned for error the refusal of the court of original jurisdiction to adjudge that the said statutes of Illinois were in violation of the Constitution of the United States. The judgment of the inferior court was, in all things, affirmed by the Supreme Court of the State, and from that judgment of affirmance the present writ of error is prosecuted.

"The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of State proceeded are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege pro-

tected by the Constitution of the United States has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

In *Furman* v. *Nichol*, 8 Wall., 44, is the following (55):

"The main question involved in this suit is of more importance than difficulty; but before we proceed to discuss it, it is necessary to consider the point of jurisdiction which is raised by the defendant in error. The circumstances under which this court is authorized to review the decisions of State tribunals has been so often considered and decided that there is hardly anything left to do but to apply the already well-settled legal principles which govern this class of cases to a particular record, in order to decide whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through with the various adjudications of this court on this subject. It is enough for the purposes of this suit to say that a cause can be removed from a State court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the State court. It is urged that the particular provision of the Constitution which the plaintiffs in error say has been violated in its application to their case should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and

judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

"Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits."

In *Murdock* v. *City of Memphis* (20 Wall.), 87 U. S., 590, it is held (633):

"The omitted clause of Act of 1789 declared that no other error should be regarded as a ground for reversal than such as appears on the face of the record and immediately respects the beforementioned questions.

"It is probable that in determining whether one of those questions was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of the case was pretty well understood as a common-law phrase at the time that statute was enacted, but the statutes of the states and new proceedings in those courts have changed and confused the matter very much since that time."

* * * * * *

(634) "But, after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

* * * * * *

"But when it appears that the federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if

there are no other issues decided in it than that. It often has occurred, however, and will occur again, that there are other points in the case than those of federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.

"Or it may be that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.

"It may also be found that notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.

"In the two latter instances there can be no doubt that the judgment of the state court must be reversed, and under the new act this court can either render its final judgment or decree here, or remand the case to the state court for that purpose."

In *Davidson* v. *New Orleans*, 96 U. S., 97, is the following (102):

"* * * But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

(107) Mr. Justice BRADLEY: "In the conclusion and general tenor of the opinion just read I concur. But I think it narrows the scope of inquiry as to

what is due process of law more than it should do. * * * "But the court in that case (18 How., 272) expressly holds that it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." (p. 276.) "I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see there is some process of law, but, 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms and procedure in each case, according as the laws, habits, customs and preferences of the people of the particular state may require."

Spencer v. *Merchant*, 125 U. S., 345, is a special assessment proceedings brought to this court by writ of error to the Supreme Court of the State of New York, to review a judgment in regard to the validity of an assessment for grading and paving a certain street. In regard to the question of jurisdiction, as applied to case under consideration, the attention of the court is called to the following (352):

"The question submitted to the Supreme Court

of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881, was unconstitutional and void because it was an attempt by the legislature to validate a void assessment, without giving the owners of the land assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. I, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116, 142; *Murray* v. *Charleston*, 96 U. S., 432, 442; *Furman* v. *Nichol*, 8 Wall., 44, 56; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579.

"The jurisdiction of this court, as is well understood, does not extend to a review of the judgment of the State court, so far as it depended upon the Constitution of the State. *Provident Institution for Savings* v. *Jersey City*, 113 U. S., 506, 514. Yet as the words of the two constitutions are alike in this respect, the decisions of the highest court of the State upon the effect of these words are entitled to great weight."

The Constitution of the State of Illinois contains a provision similar to the section of the Fourteenth Amendment to the Constitution of the United States relied on herein.

From what is shown above, it appears to us that the only conclusion to be drawn is that a federal

question, arising under the Fourteenth Amendment to the Constitution of the United States, was before the Supreme Court of Illinois, and that such question was decided adversely to the contention of the plaintiff in error. To give any other construction to the record is to presume, as it seems to us, that the Chief Justice of the Supreme Court, in allowing the writ to issue, acted without due consideration, and in disregard of the duties imposed upon him, when the application therefor was made.

We feel warranted in anticipating that your Honorable Court will conclude that a federal question was before the trial and Supreme courts, and that the decision of the Supreme Court of Illinois adversely to the contention of plaintiff in error, denied to him the privileges and immunities guaranteed under the Constitution of the United States.

A determination by this court that it has jurisdiction of the subject-matter involved herein will be a complete answer to the argument of counsel for defendant in error that neither a federal question nor the constitutionality of the Act of 1897 was before the Supreme Court of Illinois for consideration.

Counsel for defendant in error made no extended reply to contention of plaintiff in error on the merits of the controversy, which are, that the Act of 1897 is in conflict with the Fourteenth Amendment to the Constitution of the United States, and that sections 42 and 86 of said act are also in conflict with said amendment; and further, that said sections are unconstitutional because they interfere with the right of contract. Nearly the whole defense inter-

posed on behalf of defendant in error is that this court has no jurisdiction because no federal question was raised in the Supreme Court of Illinois affecting the constitutionality of said Act and of sections 42 and 86 thereof; that all questions appearing in the record are local, and that such questions have been decided adversely to plaintiff in error by the Supreme Court of Illinois.

The rule laid down in the authorities cited above apparently justify the position taken by plaintiff in error that this court has jurisdiction of the subject-matter involved in the record, and that the points insisted upon by plaintiff in error are open for decision upon the merits.

As the main defense interposed by defendant in error involves strictly legal questions, plaintiff in error will offer no further suggestions on the question of merits, other than what is set forth under the following heading:

II.

AS TO THE DECISIONS OF THE SUPREME COURT OF ILLINOIS FINDING THAT THE ACT OF 1897, AND SECTIONS 42 AND 86 THEREOF, ARE NOT IN CONFLICT WITH THE CONSTITUTION OF ILLINOIS.

Counsel for defendant in error herein insist that the constitutionality of the Act of 1897, as affected by the Fourteenth Amendment to the Constitution of the United States, was not before the Supreme Court of the State of Illinois for determination. They also urge that the constitutionality of the Act, and of sections 42 and 86 thereof, are local ques-

tions, and that the decision thereof, by the highest court of the State is binding upon this court, and by reason thereof this court is estopped from considering the merits involved in the controversy. To sustain the first contention, counsel refer to the case of *Givens* v. *Chicago*, 188 Ill., 348, where the original Act of 1897 was under consideration by the Supreme Court of Illinois, and it was there determined that such Act was not in conflict with the Constitution of Illinois. It does not appear that a federal question was before that court for determination, and none was passed upon. What its finding would have been had such question been presented and urged is simply a matter for conjecture. Counsel for defendant in error further insist that the constitutionality of sections 42 and 86, as far as the Constitution of Illinois is concerned, has been sustained by the Supreme Court of Illinois in *Hulbert* v. *Chicago*, 213 Ill., 452. This is the case now before the court, and, as shown herein, a federal question was urged before the latter court.

The fact that the Supreme Court of Illinois, in another proceedings, and one in which the present plaintiff in error was not a party, determined that the Act of 1897 was not in conflict with the Constitution of the State of Illinois, is a matter of slight importance to this court, providing said Act is in conflict with the Fourteenth Amendment to the Constitution of the United States.

That the opinion in the *Givens* case, *supra*, did not meet the approval of the entire court, and that it is open to the criticism that it is in conflict with the Constitution of Illinois and the decisions of the Su-

preme Court of that State, is quite clearly shown by the dissenting opinion of Mr. Justice Marshall, appearing in the published reports, and which is, in part, as follows:

"It is manifest that this act deprives the common council of all discretionary power in the matter of making local improvements by special assessment or special taxation. The common council might, perhaps, have the right to refuse to pass an ordinance submitted to it by the board of local improvements. At any rate there is no prohibition against the refusal on the part of the common council to pass such an ordinance. But, if it passes any ordinance, providing for a local improvement, to be paid for by special assessment or special taxation, it can only pass such ordinance, as is submitted to it by the board of local improvements. The common council is forbidden not only to pass but also to consider, any ordinance, for a local improvement, unless the same is first recommended by the board of local improvements. The act robs the common council of the power to take any independent action in the matter, and makes the council a mere agent of the board of local improvements. The common council is reduced by the act to a mere machine for the execution of the will of an outside force, to wit: the board of local improvements. Substantially, and in effect, the act substitutes the board of local improvements for the common council in all matters, relating to the making of local improvements, which involve the exercise of judgment and discretion. The necessity for the improvement, and the nature of it, and the cost of it, are all determined in advance for the common council by the board of local improvements. Even the ordinance for the improvement is framed in advance by the board of local improvements, and submitted to the common council without the power in the latter to change or modify the ordinance, or exercise its own will or judgment in relation thereto, except, as has already been stated, so far as it may have the right to refuse to pass any ordinance.

"Section 9 of Article 9 of the Constitution provides, that 'the General Assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise.' By this provision of the Constitution only the 'corporate authorities' of cities can be vested by the legislature with power to make local improvements by special assessment or special taxation. As the Act of June 14, 1897, vests the board of local improvements with the power to make such improvements by special assessment or special taxation, such power is not rightfully conferred, unless the board of local improvements, provided for in the act, can be regarded as the corporate authority of the city, in which it performs its functions. Technically, the common council, which is, undoubtedly, the corporate authority of the city, makes the local improvement provided for in the act, because it passes the ordinance for the improvement. But, inasmuch as it passes such an ordinance only, as is prepared for it by the board of local improvements, and does so at the dictation of the board, the board and not the common council, is really, and, in effect, the authority, which makes the improvement.

"The question then arises, whether the boards of local improvements, created by the act in question, are 'corporate authorities' within the meaning of section 9 of article 9 of the Constitution.

"Who are the 'corporate authorities' of cities, towns and villages, whom the Constitution clothes with the power to make local improvements by special assessment or special taxation of contiguous property, or otherwise? They have been defined by this court in many decisions.

"It is clear that the members of the board of local improvements, provided for by the Act of June 14, 1897, are not 'corporate authorities' within the meaning of the Constitution. * * * These five members, constituting the board, are appointed, so far as the City of Chicago is concerned, by the

mayor of the city. They are not officers elected by the people of the city. Nor is the Act of June 14, 1897, which provides for their appointment, an act which was adopted by the votes of the people of the City of Chicago."

(Dissenting opinion of Mr. Justice MAGRUDER in *Givens* v. *City of Chicago*, 188 Ill., 356.)

Plaintiff in error feels justified in the position taken herein, that the Act of 1897, which attempts to delegate legislative power, is not only in conflict with the Constitution of the State of Illinois, but it is also in conflict with the Fourteenth Amendment to the Constitution of the United States, for the reason, among others, that it seeks to deprive him of his property without due process of law. Further than this, said act attempts to establish a system of taxation without representation. He, therefore, respectfully asks this Honorable Court to hold said act to be in conflict with the Constitution of the United States.

III.

AS TO SECTIONS 42 AND 86 OF THE IMPROVEMENT ACT.

Notwithstanding the argument of counsel for defendant in error, plaintiff in error insists that the right of contract is involved in the above sections, and, that under said sections, the board of local improvements is not permitted to avail itself of the fluctuations of the money market by issuing bonds at the most favorable rate of interest. That the property owner is concerned in the rate of interest fixed upon improvement bonds ought to be conceded, because he is the one who furnishes the

money, and who is really responsible for the retirement of such bonds. The Local Improvement Act, however, has sought to curtail, in every manner possible, the right of property owners to protest against a local improvement and to contest the making thereof. This assertion we feel will be fully justified by a perusal of the various sections of the act set forth in the original brief.

Without making further suggestions under the above heading, the plaintiff in error confidently anticipates this Honorable Court will agree with his contention that said sections do interfere with the right of contract, and that they are in conflict with the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION.

For the various causes set forth in the record and briefs herein, plaintiff in error feels warranted in bringing the matters involved before your Honorable Court for determination. Trusting that our contention may receive the favorable consideration of this court, the foregoing is

Respectfully submitted,

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Counsel for Plaintiff in Error.